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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

DUANE LEE ENQUIST,

Defendant and Appellant.

C079717

(Super. Ct. No. 12F2963)

Defendant Duane Lee Enquist, acknowledging that we have rejected his legal position in two cases now pending before the California Supreme Court,¹ seeks to have a felony failure to appear (FTA) (Pen. Code, § 1320, subd (b)),² charge reduced to a misdemeanor FTA because the count for which he had been released was later reduced to

¹ *People v. Perez*, review granted March 15, 2016, S229046, and *People v. Eandi*, review granted November 18, 2015, S229305.

² Further undesignated statutory references are to the Penal Code.

a misdemeanor under Proposition 47, the Safe Neighborhoods and Schools Act (the Act). At resentencing, the trial court declined to reduce the FTA charge. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant had several cases pending, and on October 7, 2013, entered into a global plea bargain in which he admitted felony FTA (§ 1320, subd. (b)) while on recognizance for a felony drug charge (Health & Saf. Code, § 11377, subd. (a)), among other charges, and in exchange, some charges were dismissed and defendant was to receive a stipulated 10-year prison sentence. On November 6, 2013, that sentence was imposed. Defendant did not appeal from the judgment.

On March 4, 2015, defendant filed separate petitions to have the drug charge underlying the FTA (case No. 12F0849) and another similar drug charge (case No. 13F5278) reduced to misdemeanors under the Act. The People did not oppose the petitions, and the trial court reduced those charges to misdemeanors.

At the resentencing hearing, the trial court imposed a prison sentence of seven years four months. Defendant timely appealed from the order denying his oral request made for the first time at the resentencing hearing to reduce his felony FTA to a misdemeanor FTA.

DISCUSSION

Defendant contends reduction of his underlying drug conviction to a misdemeanor undermines the felony nature of his FTA. We disagree.

The broad purposes of the Act are “to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)

A key provision of the Act is section 1170.18, subdivision (k), which provides in part: “Any felony conviction that is recalled and resentenced under subdivision (b) or

designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm” (Italics added.)

Thus, defendant argues that the Act declares that his drug offense must now be considered a misdemeanor for all purposes, and he includes in those *purposes* what he characterizes as the reduction of his FTA conviction from a felony to a misdemeanor. Although we understand his argument, we disagree.

The Act allows persons “ ‘currently serving’ ” a felony sentence for an offense that is now a misdemeanor to petition for recall of that sentence and for resentencing under the Act, and allows persons who have served their felony sentence to apply to have their “felony convictions ‘designated as misdemeanors.’ ” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092, 1093.) But language in the Act that makes felonies misdemeanors for all purposes does not apply retroactively. (*Id.* at p. 1100.)

The Act does not speak to *pendent* or *ancillary* offenses, but only to the offenses listed therein. Defendant’s relevant drug conviction *is* now being treated as a misdemeanor “for all purposes,” but that has no bearing whatsoever on the FTA charge.³

³ Section 1320 reads in full as follows: “(a) Every person who is charged with or convicted of the commission of a misdemeanor who is released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a misdemeanor. It shall be presumed that a defendant who willfully fails to appear within 14 days of the date assigned for his or her appearance intended to evade the process of the court. [¶] (b) Every person who is charged with or convicted of the commission of a felony who is released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony, and upon conviction shall be punished by a fine not exceeding five thousand dollars (\$5,000) or by imprisonment pursuant to subdivision (h) of Section 1170, or in the county jail for not more than one year, or by both that fine and imprisonment. It shall be presumed that a defendant who willfully fails to appear within 14 days of the date assigned for his or her appearance intended to evade the process of the court.” (Stats. 2011, ch. 15, § 459 [part of 2011 Realignment Legislation].)

As we have observed before, “[t]he criminal conduct proscribed by section 1320, subdivision (b), is grounded in the violation of a contractual agreement between a defendant and the People.” (*People v. Jenkins* (1983) 146 Cal.App.3d 22, 28.) It is now a specific intent crime (see *People v. Wesley* (1988) 198 Cal.App.3d 519, 522-524 [discussing statutory history]), and a crime of moral turpitude (see *People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556-1557), that is complete when the defendant willfully fails to appear “in order to evade the process of the court.” (§ 1320, subs. (a) & (b).)

The severity of an FTA is not lessened by the outcome of the underlying charge, because section 1320 applies to persons charged with *or* convicted of crimes. The “convicted of” language was added to clarify that the statutes applied to persons on bail postconviction, which had been uncertain before. (See *People v. Jimenez* (1993) 19 Cal.App.4th 1175, 1177-1181 [resolving issue as to section 1320.5 (the on-bail FTA statute)], followed by Stats. 1996, ch. 354, §§ 2-3, pp. 2452-2453 [amending both §§ 1320 and 1320.5 to encompass postconviction FTAs].) The usage of “or” unaccompanied by any indication that what follows is qualified, “indicates an intention to use [or] disjunctively so as to designate alternative or separate categories.” (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) A defendant is charged with crimes contained in an accusatory pleading, which exists to provide defendant with notice of the charges. (See *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936; §§ 950, 952.) Here, the defendant was charged with a felony at the time he promised to appear as directed.

In *People v. Walker* (2002) 29 Cal.4th 577, our Supreme Court interpreted a similar statute, providing for a penalty enhancement when a defendant who is on bail for one offense commits another (§ 12022.1). The new offense Walker committed while out on bail was FTA while on bail (§ 1320.5), a statute similar to the FTA statute directly at issue in this case (§ 1320, subd. (b), see fn. 3, *ante*). *Walker* held that imposing separate punishment for the FTA and the on-bail enhancement was appropriate, because the two statutes served different purposes. In part, *Walker* observed that “[w]ith respect to

section 1320.5, the legislative history states explicitly that its purpose is ‘to deter bail jumping.’ [Citations.] The language and history of section 1320.5 also reflect the Legislature’s view that fulfillment of this purpose requires punishment *whether or not the defendant ultimately is convicted of the charge for which he or she was out on bail when failing to appear in court as ordered.*” (*Walker*, at p. 583, italics added.)

As *Walker* pointed out, many things can happen to an underlying charge:

“For example: (1) the prosecutor might move to dismiss the felony charge for insufficient evidence or after suppression of the evidence (§§ 1385, 1538.5); (2) the court might dismiss the charge or set aside the indictment or information (§§ 871, 995, 1385) or enter a judgment of acquittal before submission of the case to the jury (§ 1118.1); (3) the prosecutor might move to dismiss the charge in the interests of justice or reduce it to a misdemeanor as part of a plea bargain; (4) *the court might reduce the charge to a misdemeanor* (§ 17, subd. (b)); (5) the jury might acquit the defendant; or (6) the conviction might be reversed or dismissed on a state or federal writ of habeas corpus.” (*People v. Walker, supra*, 29 Cal.4th at p. 587, italics added.)

Similarly, many things can happen to the underlying charge on a felony FTA, including its reduction to a misdemeanor as occurred here. Indeed, as we emphasized in the above quotation, *Walker* referenced similar reductions that occur under section 17, subdivision (b), which also reduce an offense to a misdemeanor “for all purposes” under certain circumstances, the exact language used by the voters in the Act, yet *Walker* viewed such a later reduction as immaterial to the gravamen of the failure to appear. None of the potential outcomes mentioned by *Walker* alters the severity of the defendant’s act *at the time* he or she willfully evaded the process of the court.

Other cases involving punishment based on a defendant’s status at the time an act or omission is committed are in accord with *Walker*.

For example, a felon in possession of a firearm cannot halt a prosecution for such crime by attacking the validity of the underlying felony, because the offense is based on that person’s felon status *at the time of possession*. (See *People v. Harty* (1985) 173 Cal.App.3d 493, 499-500 [construing former § 12021; “the possible invalidity of an

underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon”]; see also *People v. Sanchez* (1989) 211 Cal.App.3d 477, 479-481 [equivalent holding construing former § 12021.1].)

We extended this “status” rule in *In re Watford* (2010) 186 Cal.App.4th 684. Watford was convicted of a sex offense in Massachusetts, and convicted in California of failing to register as a sex offender; we affirmed his conviction on appeal. (*Id.* at pp. 686-687.) Watford then successfully moved to set aside his plea in the Massachusetts case, and the sex charge was dismissed. (*Id.* at p. 687.) Watford then sought habeas corpus relief in this court, contending that by eliminating the underlying sex conviction, he vitiated the conviction for failing to register. (*Ibid.*)

We rejected this view. (*In re Watford, supra*, 186 Cal.App.4th at pp. 687-694.) We emphasized that the issue was whether “*at the time of the failure to register*, the petitioner was under a legal duty to register.” (*Id.* at p. 690, italics added.) “The [sex offender statute’s] regulatory purpose is fulfilled by requiring the sex offender to register based upon the fact of conviction until such time as the predicate conviction may be invalidated.” (*Id.* at p. 691.) “The Legislature determined that persons convicted of sex offenses present a sufficient risk to society to justify requiring them to register, and holding them accountable for not registering, even if the predicate offense existing when the offender fails to register is later invalidated.” (*Id.* at p. 693.)

Similarly, in this case, the Legislature has determined that a person released *while facing* felony charges should be punished as a felon if she or he fails to appear, whereas a person released *while facing* misdemeanor charges should be punished as a misdemeanant for breaching such promise, and as indicated in *Walker*, construing a parallel statute, the *outcome* of the underlying charge has no bearing on the severity of the offense of failing to appear as promised. It is an eminently rational distinction for the Legislature to punish persons charged with a felony who fail to appear as promised more

harshly than persons charged with a misdemeanor who fail to appear. Thus, we reject defendant's effort to recast his claim as an equal protection violation.⁴

In short, defendant was entitled to reduction of the underlying drug charge to a misdemeanor, and the trial court properly granted him that relief, but that reduction of his drug charge had no effect on defendant's felony FTA charge.

DISPOSITION

The order resentencing defendant under the Act is affirmed.

/s/
Duarte, J.

We concur:

/s/
Robie, Acting P. J.

/s/
Hoch, J.

⁴ The People correctly point out that defendant did not make an equal protection argument in the trial court. On appeal, defendant makes the claim that it is irrational to treat him differently based on the date of his FTA conviction in relation to passage of the Act. If we reached this claim, we would reject it, because the Legislature rationally can treat *accused* felons differently than *accused* misdemeanants, regardless of the ultimate outcome of the proceedings, as explained above.